NO. 20000

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NESBERT W. COX and
MARVIN P. McGUIRE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

See also Vol. 3349

APPELLANTS' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLANTS' REPLY BRIEF

In reply, appellants will make response only to a limited number of the contentions made by the Government 1/ in its brief, confident that this Court will not regard the lack of response to certain Government contentions as any concession of their validity. Unlike the situation of an appellee's brief, it is of course not the office of a reply brief to answer every argument of the appellee when sufficient answer is embodied in the opening brief.

Neither will appellants attempt to restate the points made in their opening brief. To do so would not only be improper but unnecessary,

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1/ As the appellee will be designated herein for convenience.

Other matters of form: Appellants' opening brief will be cited as "A.O.B." followed by appropriate pages; appellee's brief will be cited "Govt. Brief", followed by similar pages. Except where necessary for clarity, reference to the appellants will be made collectively by that word. Record references will be made in the same manner as appellants' opening brief.

since they are already adequately developed. In many instances, the Government has totally failed to meet appellants' contentions and virtually all of the authorities upon which appellants relied have been similarly ignored. In that posture of the case, little more need -- nor can -- be said. This Court can recognize an unanswered contention for what it is.

Reply will be made only in areas where it appears that further comment could be of value to the Court.

The difficulty of reply has been exacerbated by the Government's practice of repeatedly making factual assertions in argument without reference to the pages of the record which support those assertions, and also by its employment of case citations without reference to the pages where the purported holding might be discovered. These failures are not only submitted to be a violation of this Court's rules, 2/ but have also required appellants to search the record in an effort to discover foundation for their opponent's assertions, and to search the cited decisions in an attempt to locate the purported holding. Those searches have, in most instances, proved unsuccessful.

Appellants submit, as a matter worthy of introductory note, the strange fact that, of the authorities upon which the Government relies, a total of two appellate decisions 3/ involve postal offenses. All of the other appellate cases cited deal with entirely different fields of criminal law. While, of course, briefs often cite many cases involving differing offenses on matters of procedure and the like, it does not seem unduly burdensome to require at least some meaningful evaluation of the

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2/ Rules 18.2(e) and 18.3.

3/ United States v. Johne, 322 F.2d 267 [Brief, p. 31], and United States v. Ross, 205 F.2d 619 [p. 21].

authorities bearing upon the particular type of prosecution involved. This is believed particularly true in view of the fact that a significant number of the authorities involving postal offenses which the appellants set forth in their opening brief have been totally ignored by the Government. 4/

I

THE GOVERNMENT'S BRIEF MISSTATES CERTAIN MATTERS OF EVIDENCE AND RELIES UPON APPARENT IRRELEVANCIES.

While appellants have neither the desire nor the space in which to dispute each of the matters of purported fact which they deem inappropriate in the Government's brief, their duty to aid this Court in a meaningful analysis of the issues requires at least brief note of certain irrelevancies and inaccuracies.

The initial discussion [Govt. Brief 1 and 2] of a different prosecution of one of the appellants is of obscure materiality. True, appellant

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4/ For example, only:

Giraud v. United States (9th Cir., 1965), 348 F.2d 820 [A.O.B. 32 and 60];
United States v. Boese, 46 Fed. 917 [A.O.B. 33-36 and 53];
Naftziger v. United States (8th Cir., 1912), 200 Fed. 494 [A.O.B. 33];
Irwin v. United States (9th Cir., 1964), 338 F.2d 770 [A.O.B. 47];
Ross v. United States (9th Cir., 1939), 103 F.2d 600 [A.O.B. 66-69];
Harris v. United States (5th Cir., 1957), 239 F.2d 612 [A.O.B. 40];
Thomas v. United States (6th Cir., 1959), 262 F.2d 844 [A.O.B. 40];
Roe v. United States (5th Cir., 1961), 287 F.2d 435 [A.O.B. 41 and 58].

McGuire was accused of another purported mailing, but he was acquitted of that charge! Apparently its inclusion is an effort to persuade this Court -- under a theory of "guilt by acquittal" -- that the appellants were "bad men" simply because they were charged, and therefore had some propensity for the commission of crime. It is clearly established that evidence pertaining to such purported propensity will be given no effect by the courts. (Please see A.O.B. 52-53.)

The Government has made a number of assertions of fact, in connection with the confession and motion to suppress, which are either without support in the record, or else directly contrary to the record. Each is patently colored to justify or excuse Agent Hardy's conduct. A few, only, of these will be discussed here. 5/

It is claimed that Hardy "noticed that quite a few envelopes and various other papers were strewn around the room" and that this motivated his further conduct [Govt. Brief 6]. In point of fact his testimony was that he noticed "that there were several papers laying [sic] about the room" [R.T. 19:3-5]. There is a difference, it is submitted, between "several" (the evidence) and "quite a few" (the Government's assertion), but more significantly the reference to envelopes simply does not appear. The appellant McGuire was not indicted for being a messy housekeeper, and it is submitted that the fact that there were several papers scattered through a room hardly constitutes a license to search without warrant.

5/ Space limitations have required the elimination of consideration of other inaccuracies. The ones which are discussed, are not necessarily of any great importance, in appellants' opinion, but they are illustrative and possessed of a potential of misleading. As in the instances not discussed, the Government makes the assertions without specific transcript references.

In discussing the purportedly-uncoerced nature of the confession, the prosecution asserts [Govt. Brief 20] that its voluntary nature is shown by the fact that it was not made until "after McGuire had consulted with his attorney." The Government regrettably failed to make any reference to the point in the record where this purported evidence might be found, but appellants have searched and do find some reference to an attorney. In the course of Hardy's urgings that McGuire come to his office and make a statement, McGuire asserted his desire to consider obtaining counsel, to which Hardy responded only with further urgings [R. T. 33:13-20 6/]. McGuire testified that he got an attorney's name out of the telephone book and phoned him before seeing Hardy at the latter's office and that obscurely-identified attorney said "it was okay to go in" and, evidently, confess. The attorney's first name was not even known [R. T. 189:3-21]. This, it is submitted, is quite a different picture than that which the Government paints of a citizen going in to see his own counsel and consulting with him.

A serious warping of the evidence appears at pages 30-31 of the Government's brief, where it is stated:

> "On September 5, 1963, Exhibits Nos. 1 and 2 are mailed from San Francisco (where appellant Cox lives) and they are found to each contain several photographs with X's on the reverse side, several of which are of two girls together." (Emphasis added.)

Disregarding the lack of any transcript references to support these assertions, and disregarding further the gratuitous observation concerning "two girls together" -- a rather unnecessary endeavor to

6/ See also, concerning McGuire's desire for counsel, R. T. 72: 15-19.

produce prejudice, particularly in view of the stipulation at page 5 of appellants' opening brief -- appellants submit that this is a factual misadventure. Technically, if the words are read in a vacuum, they are sustainable, but when read in the semantic context of the sentence the effect produced is utterly misleading. Exhibits 1 and 2 are opened, cancelled mail envelopes, postmarked at San Francisco September 5, and it is concededly a reasonable inference that they were mailed from that city that date.

But there is absolutely no justification for the succeeding clause that "they are found to contain" several photographs. The clear -- and inaccurate -- implication is that there is evidence that when mailed they contained those photographs, and there is no such evidence. Two weeks after those envelopes were mailed, Agent Hardy found certain photographs and other matter in them; nobody "found" that the contents of those opened envelopes was the same on September 18 as it was on September 5, when they were mailed. By that simple assertion, the Government has sought to blot out thirteen days, during which all sorts of matters may have been removed from or placed inside those opened envelopes.

II
THE GOVERNMENT HAS FAILED TO MEET ITS BURDENS CONCERNING THE SEIZURE AND CONFESSION, AND TO OVERCOME THEIR CONSTITUTIONAL INTOLERABILITY.

A. THE EFFECT OF THE OVERREACHING AND COERCION FOUND TO BE PRESENT IS NOT AMELIORATED BY THE ADDITIONAL FACT THAT A DETAIL OF APPELLANT McGUIRE'S TESTIMONY WAS DISBELIEVED.

The Government contends [Govt. Brief 19] that the trial court found the necessary "clear and convincing" evidence of consent (please

see A. O. B. 21-22) and accuses the appellants of making an incomplete statement of the actual finding of the trial judge. If that were so, it would be a serious matter, but it is not true.

The Court will recall that in their opening brief [pages 19 and 20], appellants noted the trial court's conclusion that both "overreaching and coercion" had been practiced, but that it nevertheless found consent because of disbelief of McGuire's version as to one detail of the events of the search. Appellants argued that disbelief as to the detail did not, in law, supply the requisite affirmative showing of consent. The Government has not only completely ignored that argument, but in the course of its own criticism of the appellants terminates its extract from the trial court's comments immediately before the discussion of that disbelieved detail. Appellants submit that this, in itself, is a tacit admission of the point urged. Continuing beyond the prosecution's ellipses, the trial court's statement, following its conclusion that there were elements of truth in McGuire's version and that there had been overreaching and coercion, was:

> "It is my final conclusion that I cannot accept the version as given by Mr. McGuire [at this point the Government discontinues quoting], and there are two or three matters, two or three rather key circumstances that have led me to believe that, or have led me to that conclusion, I should say.
>
> "Firstly, I do not believe under the circumstances that Mr. Hardy came up to the door as Mr. McGuire testified. Mr. McGuire stated that Mr. Hardy was parked fifty or sixty feet behind him and he stayed in his car for a little while and he was out working on his car, and as he leaned over and looked into it

Mr. Hardy rushed across the driveway, ran up to the door and pounded on it.

"Now, I don't know just how far the door was away, or the distance from the street up to the door, but however far it was it seems to me that it would have been difficult for Mr. McGuire to have been looking down and bending over and at the same time observe what Mr. Hardy was doing, and also possibly difficult to hear at that distance just what was stated, if he shouted. That is a procedure I think that would be quite uncommon for a law enforcement officer such as a postal inspector.

"Now, that to me does not ring true, Mr. McGuire's statement as to that." [256:24-257:21] (emphasis added).

The trial court may well have been entirely justified in believing Hardy's version as to how he approached the doorway. Nevertheless, that disbelief clearly fails to supply clear and convincing proof of consent to everything that occurred thereafter.

B. THE GOVERNMENT RELIES ON INAPPOSITE AUTHORITIES, REFUTED BY A RECENT HOLDING OF THIS COURT.

Appellants are somewhat baffled at the authorities upon which the Government relies as justifying the search and seizure. Primary reliance is placed upon Ellison v. United States (D. C. Cir., 1953), 206 F. 2d 476, 478. There, it was held that an officer who stands at the door of a premises and observes through the doorway "the fruits of crime -- or what he has good reason to believe to be the fruits of crime" (in that case the recently-stolen goods), has probable cause to search. If the fact that a room contains several papers lying around constitutes

good cause to believe that those papers are the fruits of a crime -- or even if the presence of cancelled envelopes constitutes good cause to believe they are involved in postal violations -- then there will be scarcely any household in this nation which is not subject to indiscriminate search by the postal authorities. The situation is so remote from that at bar as to approach the utterly irrelevant. 7/

The Government also asserts the authority of this Court's decision in Polk v. United States, 314 F. 2d 837. 8/ Polk was a per curiam affirmance based upon the trial court's finding that there had been no entry onto the defendant's premises. It followed an earlier appeal in the same case in which this Court (291 F. 2d 230) reversed for a determination as to whether the officers made their observations while within the defendant's premises or from a public area. The affirmance in the second Polk case was based upon the factual finding that the latter was true. In the case at bar, no one has even suggested that Hardy's observations were not made while he was within the appellant McGuire's home. One is hard put, therefore, to understand the basis for reliance on Polk.

Probably the decision most destructive of the Government's

7/ The propriety of the Government's reliance on Ellison is also negated by significant decisions of courts of appeal distinguishing Ellison in a manner virtually identical to the distinction here. See for example:

Hobson v. United States (8th Cir., 1955), 226 F. 2d 890, 894;

Work v. United States (D. C. Cir. [the same court which decided Ellison], 1957), 243 F. 2d 660, 662 (pointing out that in Ellison "the evidence sought to be suppressed was secured before entry was made.").

8/ Cited by the Government as "Poke".

position is the recent holding of this Court in Cipres v. United States, 343 F. 2d 95.

There, the trial court expressly stated that it believed the evidence of the officers involved and therefore found as a fact that the defendant had told the officers they might make the search. (In the case at bar, of course, the trial court made no such finding, but merely found that some details of McGuire's testimony were not credible, thereupon concluding that there was consent notwithstanding the over-reaching and coercion; it is submitted that this is a much weaker finding than that involved in Cipres.) On appeal, this Court reversed, holding that the issue was much broader than merely a simple finding as to whether there was "verbal assent", and holding that this issue could not be resolved by a mere weighing of credibility as between the defendant and the officers. 343 F. 2d at 97.

> "Waiver, in this context, means the 'intentional relinquishment of a known right of privilege.' [citation] Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. We recently sustained a district court finding that such waiver was lacking despite an express verbal consent, and such cases are common. They rest not only upon the nature of the waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights

of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did."

"A number of circumstances suggest that [the defendants'] assent may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: It was attained 'under color of the badge' and was therefore presumptively coerced."

343 F. 2d at 97-98 (emphasis added).

Here, even if one accepts the Government's thesis that a verbal consent was finally given after Agent Hardy's numerous "fruitless efforts" to obtain the consent, there is no question that there was overreaching nor that the consent was infected by actual, as well as presumptive, coercion. This Court there also noted, as indicative of lack of waiver, certain factors which are present here, such as the fact that the verbal consent was given only after it had been previously withheld and that it was accompanied by protestations of innocence.

C. SUPREME COURT DECISIONS UPON WHICH THE GOVERNMENT RELIES ARE ACTUALLY DESTRUCTIVE OF THE GOVERNMENT'S POSITION.

Finally, the employment of three recent decisions of the Supreme Court in support of the proposition that McGuire was "acting 'with a rational intellect and a free will'" [Govt. Brief 21] is incomprehensible. In each of those decisions, confessions were held inadmissible for

significant reasons. 9/ Each of those decisions actually appears to be the diametric opposite of the point for which it is cited.

III
THE GOVERNMENT HAS TOTALLY FAILED TO MEET THE CONTENTIONS OF INSUFFICIENCY OF THE EVIDENCE.

A. THE FAILURE TO ESTABLISH COX'S IDENTITY IS SUBSTANTIALLY CONCEDED, AND THE CIRCUMSTANTIAL "EVIDENCE" OF GUILT IS INSUBSTANTIAL ON ITS FACE.

The Government has failed to make even an effort at showing that appellant Nesbert Cox and the Ned Cox who was implicated were one and the same person; on appeal as at the trial, the Government has satisfied itself with the proposition that a denial of identity is evidence of identity. The untenable nature of this has already been shown [A.O. B. 57-61].

Beyond this "guilt by denial" argument, the Government relies

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9/ Reck v. Page, 367 U.S. 433, 440-1, 444, 81 S.Ct. 1541, 6 L. Ed. 2d 948 (re circumstances other than physical coercion);

Spano v. New York, 360 U.S. 315, 321-2, 324, 79 S.Ct. 1202, 3 L. Ed. 2d 1265.

The most significant of the three decisions, however, is the unanimous decision in Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L. Ed. 2d 242. In that case, several circumstances highly pertinent to the confession involved here were also present and noted to be significant, including:

1. A history of mental illness and hospitalization (361 U.S. 200-202);

2. The fact that the police officer had composed the statement in narrative form, for the signature of the accused, the practice followed by Agent Hardy here (361 U.S. at 204); and

3. The factor of any history of emotional instability or mental illness, even if not reaching the point of psychosis (361 U.S. at 208).

upon a misstated claim of a finding as to the contents of certain mailings (see §I, supra), and the facts that certain of the seized matters were printed and that Cox worked in a print shop. This is the sum total of the admittedly-circumstantial "proof" of Cox's guilt. To elaborate on its utter inadequacy would be lilly-gilding.

B. THE ATTEMPTED DISTINCTION OF THE JOHNE CASE IS UNTENABLE.

The Government seeks to distinguish the highly compelling decision in United States v. Johne (7th Cir., 1963), 322 F. 2d 265 [see A.O.B. 33 and, particularly, 52-53]. The sole distinction urged is that, while evidence of intent is not sufficient to show the commission of crime, evidence of planning does constitute affirmative evidence that the plans were carried out [Govt. Brief 31]. That distinction is too fine for appellants' comprehension. If evidence that a person intends to do an act is insufficient to sustain a finding that he did it, it is difficult to understand why evidence that he was planning to do the act is any more evidentiary of its execution.

C. IN VIEW OF THE FAILURE OF PROOF AS TO COX, THERE IS A FAILURE AS TO McGUIRE AND THE GOVERNMENT'S ATTEMPT TO AVOID THIS BY A CHANGE OF POSITION ON APPEAL IS PROHIBITED.

1. IN THE ABSENCE OF SUBSTANTIAL EVIDENCE CONCERNING A GUILTY PRINCIPAL NAMED IN THE INDICTMENT, THERE HAS BEEN A FAILURE OF PROOF AS TO McGUIRE AS HIS PURPORTED AIDER AND ABETTOR.

With the Government's tacit admission of lack of identification

of the appellant Cox, the contentions noted in the opening brief concerning the deficiency of proof that the appellant McGuire aided the appellant Cox appears inescapable. McGuire was indicted for aiding Nesbert W. Cox, and cannot be convicted by evidence relating to any activities of someone who is not shown to be Nesbert W. Cox.

The Government's answer is the argument that, since a person may be convicted of aiding and abetting one who is neither charged nor convicted, nor even identified, McGuire's conviction may be affirmed on the ground that he aided and abetted "someone".

It is submitted that this argument is untenable. The law requires a guilty principal before the alleged accomplice may be convicted.

Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265-266, 83 S.Ct. 1130, 10 L.Ed.2d 335. 10/

This requirement is not satisfied by evidence, such as that relied upon here, that the accused accomplice performed acts which might conceivably have been of assistance to some "principal", without any evidence of the commission of a crime by that alleged-but-unknown principal. The Government could prove to the nth degree, as it urges here [Govt. Brief 28], that McGuire corresponded with "someone", thanked "someone" and the like, but that does not prove that "someone" committed a postal offense as charged nor that these acts were in aid of any guilty act.

10/ Approving, among many other decisions, a number of authorities cited by appellants here and in their opening brief, including:

Karrell v. United States (9th Cir., 1950), 181 F.2d 981 [A.O.B. 61];

Edwards v. United States (5th Cir., 1961), 286 F.2d 681 [A.O.B. 62].

In a most persuasive case, it was held, in reversing a conviction as aider and abettor, that it is obvious that there can be no conviction for aiding and abetting unless there is satisfactory evidence of two elements: 1) his participation, and 2) that there was a principal for whom he was acting, which principal was guilty of the offense.

United States v. Horton (7th Cir., 1950),

180 F. 2d 427, 431.

The court noted:

> "The situation is no different than if Kile [the supposed principal] had been tried with Horton and there had been a failure of proof as to Kile. Then there would have been a failure of proof as to the commission of an offense by Kile and consequently Horton could not have been convicted as an aider and abettor." 180 F. 2d at 431.

The hypothetical situation proposed there is a precise characterization of the posture of the case at bar.

2. THE GOVERNMENT'S NEW CONTENTION ON APPEAL, REPUDIATING THE INDICTMENT FOR AIDING NESBERT W. COX, IS IMPROPER AND SELF-ILLUSTRATIVE OF A FATAL VARIANCE.

Faced with these insuperable difficulties, the Government has made a 13th-hour change of position on appeal, now arguing that McGuire was not tried or convicted as an accomplice of Nesbert W. Cox. This argument proves too much.

McGuire was not indicted for aiding and abetting "someone", nor a person unknown, nor anything of the sort. He was indicted for aiding and abetting a specified person: Nesbert W. Cox [C. T. 2:19-28,

3:3-12]. The Government now says in its brief: Okay, he didn't aid and abet Nesbert W. Cox; he aided and abetted "someone" and that's what he was convicted of.

This assertion is disingenuous. It is inconceivable that the grand jury had in mind aiding and abetting "someone" else, when it indicted for aiding and abetting Nesbert W. Cox. It is inconceivable that an indictment charging McGuire with aiding Nesbert W. Cox sufficiently advised him that he should prepare his defense to the charge of aiding "someone" else. It is inconceivable that the trial court found McGuire guilty of aiding and abetting "someone" else, rather than Nesbert W. Cox.

But, giving this afterthought theory of the Government its weight, it clearly and unavoidably discloses a fatal variance. Exhaustive research has not disclosed any appellate decision which passed, one way or another, on the question of a variance in a prosecution for aiding and abetting where the charge was aiding one person and the proof related to aiding another. To that extent, this appears to be a question of first impression, but the reason would seem apparent: Unlike the ordinary substantive offense, the question of identity (or at least existence) of the principal is all-important in the prosecution of a purported accomplice, and it never seems to have been seriously urged otherwise.

This case is totally unlike the decision of this Court in Ferrari v. United States (9th Cir., 1948), 169 F.2d 353, 354. There, the defendant was charged with receiving heroin from one Bruno, while the evidence showed receipt from one Flier. This Court held that a variance was obviously present, but non-prejudicial because the defense

was entirely one of alibi and therefore identity could not affect the preparation of the defense. This distinguishing element -- which is of course not present here -- was subsequently recognized in a case in which there was the same variance but misidentification was held prejudicial, and the judgment reversed, because there was no way to prepare a defense concerning a transaction with a person not identified in the indictment.

Hallman v. United States (D.C. Cir., 1953),
208 F.2d 825, 826, 827.

Tangential but persuasive authority for the proposition that variance on the matter of identity is prejudicial, where the case involves the relationship of persons, appears from the reversal of a conviction by this Court, on the ground of variance, in the highly-analogous context of a conspiracy prosecution.

Rocha v. United States (9th Cir., 1961), 288 F.2d 545,
553, certiorari denied 366 U.S. 948.

The fatal effect of this shift of position by the Government on appeal may be illustrated in another way. If McGuire had not been indicted for aiding Nesbert W. Cox, but rather for aiding the latterly-conceived "someone", there would have been totally improper joinder, and both appellants would have been entitled to a severance.

Ingram v. United States (4th Cir., 1959),
272 F.2d 567, 570-578.

No attack on the joinder was made in the case at bar, of course, but this was for a perfectly obvious reason: both appellants believed the charges to be as stated in the indictment, that McGuire aided Nesbert W. Cox, not that McGuire aided "someone".

D. A RECENT POSTAL-OFFENSE DECISION CONCERNING THE INSUFFICIENCY OF EVIDENCE OF MERE PROBABILITY IS OF PERSUASIVE INTEREST HERE.

Since the filing of their opening brief, appellants have discovered a recent and highly persuasive decision in which a conviction for postal offense was reversed on appeal. While the case involved mail fraud, the pivotal issue there (and equally involved here) was whether there had in fact been a use of the mails for the purpose alleged.

United States v. Ellicott (4th Cir., 1964),
336 F. 2d 868.

While recognizing the limitations on the power of the appellate court and also the great weight to be given the findings of the district judge, sitting (as here) without a jury, to determine the facts, the appellate court nevertheless held that where the evidence does not reach the level of the substantial on that issue, it becomes a question of law, since no crime has then been made out. 336 F. 2d at 871.

There was extensive evidence described in the opinion concerning practices of the defendants and their employees in handling mail, metering prospective mailings and the like, but the court held:

> "At most the evidence proved no more than a probability of the use of the mails. Principally, reliance is put on a customary practice in the Charter Department, for no one states Jones mailed the letter. Thus the government depends merely upon an inference from conventional procedure: that if the Department usually noted deliveries in a distinctive way, then it did so in this specific instance. But this is only a

probability which, however great, cannot convict. . . . While we are sensible to the difficulties of reconstructing one of myriad postal events, nevertheless when, as here, the prosecution makes it the vital nexus of the accused to the crime it assumes and must surmount this difficulty."

336 F. 2d at 870-871.

The court continued on to note, as to one defendant, that the statements of co-defendants were required to be disregarded and that once these were put aside:

"Only a practice or custom of mailing is left, proving nothing more than a probability, upon which a judgment beyond a reasonable doubt cannot rest. No one testified to an actual mailing."

336 F. 2d at 872 (emphasis added).

That case is virtually four-square with the case at bar. Here, there is no doubt that the appellants did, at some time, use the mails, as did the appellants in that case, and as do an overwhelming majority of the citizens of this country. But, taken at best, there is no more than a possibility -- or even, conceivably, although one doubts it, a probability -- that a mailing of the matter which is the res of this prosecution ever occurred, to say nothing of occurring at the time or times (whichever it is) charged in the indictment and between the persons charged.

Respectfully submitted,

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Attorney for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward L. Lascher

EDWARD L. LASCHER